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May 28, 2004

VIA HAND DELIVERY

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Attention: Janice M. Myles
Wireline Competition Bureau
Competition Policy Division
445 12th Street, S.W.
Suite 5-C327
Washington, D.C. 20554

Re: WC Docket No. 04-36

Dear Sir or Madam:

Bend Broadband ("Bend"); Cebridge Connections, Inc. ("Cebridge"); Insight Communications Company, Inc. ("Insight"); and Susquehanna Communications ("SusCom") (collectively, "Cable Ops"), by their attorneys, submit these comments in response to the Commission's Notice of Proposed Rulemaking in this proceeding. Cable Ops represent a broad cross-section of the cable television industry, operating cable systems of various sizes that serve numerous communities across the United States, ranging from urban to rural. Cable Ops are each seriously exploring the provision of IP-enabled services, i.e., those services making use of Internet Protocol ("IP") technology, such as Voice over IP ("VoIP"). Accordingly, Cable Ops are vitally interested in the issues raised in this proceeding.

Should there be any questions regarding this matter, please contact the undersigned directly.

Sincerely,

Arthur H. Harding

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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
IP-Enabled Services	)	WC Docket No. 04-36
	)	

To: The Commission

COMMENTS

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CEBRIDGE CONNECTIONS, INC.
INSIGHT COMMUNICATIONS COMPANY, INC.
SUSQUEHANNA COMMUNICATIONS

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COMMENTS

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[1] *IP-Enabled Services*, 19 FCC Rcd 4863 (2004) ("NPRM").

capable of delivering interactive broadband services when acquired. Accordingly, Cebridge is investing the necessary capital to upgrade these systems as soon as possible, and Cebridge is enthusiastic over the potential for VoIP to be a critical catalyst to further expedite the roll-out of advanced broadband capabilities. Accordingly, Cable Ops are vitally interested in the issues raised in this proceeding.

I. INTRODUCTION AND SUMMARY

Cable television operators, including Cable Ops, have in recent years undertaken one of the most ambitious infrastructure projects in American history, investing tens of billions of dollars upgrading their plants to provide the backbone of advanced communications for the 21st century.[2] This investment presents the ultimate risk of capital, without assistance from the government, to fulfill and generate potential demand for services, especially broadband services, that have the potential to dramatically improve economic efficiency and consumer satisfaction.[3] Thus, Cable Ops are extremely excited by the prospect of providing IP-enabled services to their existing and new customers. As the Commission correctly recognizes, such services -- "and VoIP in particular -- will encourage consumers to demand more broadband connections. . . ."[4]

The rapid deployment of broadband, which cable operators have spearheaded at their own expense, is a primary goal of the Telecommunications Act of 1996.[5] Another paramount

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[2] *See, e.g.*, NCTA Policy Paper, "Balancing Responsibilities and Rights: A Regulatory Model for Facilities-Based VoIP Competition," Feb. 2, 2004, at 7.

[3] *See* NPRM at ¶ 22. Notably, cable operators have financed construction of their broadband facilities through entrepreneurial risk capital, unlike the legacy telephone system that was for decades the beneficiary of a governmentally-sanctioned monopoly and a guaranteed rate of return from regulated ratepayers.

[4] NPRM at ¶ 5.

[5] *See* Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, § 706(a) ("1996 Act"), reproduced in the notes under 47 U.S.C. § 157 ("The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . .").

goal of the 1996 Act is facilities-based residential telephone competition.[6] Currently, cable operators, including Cable Ops, are in the best position to fulfill both of these crucial goals, and their ability to deploy IP-enabled services is a critical piece of this puzzle. Chairman Powell clearly recognizes this potential, as indicated by his recent statement about VoIP: "I think it is going to be the very, very best and biggest breakthrough in our ambitions and dreams about competition ever. . . . If consumers respond to it, we will have to be vigilant about not allowing the incumbent, in any anticompetitive way, to choke off that possibility."[7]

However, cable operators face considerable barriers in providing this competition. Perhaps the greatest obstacle is regulatory uncertainty. As Chairman Powell stated at the recent NCTA Convention, "I personally believe -- because it's what I know best -- that one of the greatest impediments that remains is that government clarify the legal and regulatory regime. . . . They don't know whether at any moment, some state or federal regulator or legislator is going to sort of pounce in and declare you something akin to an old telephone company, with all that entails."[8]

The cure for such uncertainty is a regulatory "light touch." Chairman Powell is on record specifically calling for such treatment for VoIP:

> I have stated my solid view that VoIP offers enormous potential for consumers and should be very lightly regulated. I remain staunchly committed to that position. VoIP is clearly not your father's telephone service. It represents a uniquely new form of communication that promises to offer dramatic advances in the consumer experience. . . .

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[6] *See, e.g.*, H.R. Rep. No. 104-204, at 71 ("Section 242(b)(1) describes the specific terms and conditions for interconnection, compensation, and equal access, which are integral to a competing provider seeking to offer local telephone services over its own facilities.").

[7] Ted Hearn, *Incumbents: Be Afraid*, MULTICHANNEL NEWS, May 10, 2004, at 32 (quoting FCC Chairman Michael K. Powell).

[8] *Id.*

> The promise of such services and the potential for greater competition combine to justify minimal and innovation-friendly regulatory policy.[9]

This is also the approach the Commission has taken regarding providers of services that utilize the Internet:

> As a truly global network providing instantaneous connectivity to individuals and services, the Internet has transcended historical jurisdictional boundaries to become one of the greatest drivers of consumer choice and benefit, technical innovation, and economic development in the United States in the last ten years. We acknowledge that it has done so in an environment that is free of many of the regulatory obligations applied to traditional telecommunications services and networks.[10]

Likewise, Congress and the Commission have adopted a light touch approach regarding regulation of wireless services.[11]

Statements issued by Chairman Powell and Commissioners Abernathy, Copps, Martin and Adelstein accompanying the NPRM largely point toward a similar approach for IP-enabled services:

- More than two decades ago, the Commission made the courageous decision to fence off information services -- the precursors of today's internet -- from traditional monopoly regulation. This approach was embraced by Congress in that 1996 Act. The Commission's pro-competitive and deregulatory policies allowed competition to flourish and helped usher in a period of growth and innovation unlike any other in our nation's history. Today, we issue an item that follows in that tradition of fostering innovation and consumer choice.[12]

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[9] *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Memorandum Opinion and Order, 19 FCC Rcd 7457 (2004) ("*AT&T VoIP Order*") (statement of Chairman Michael K. Powell).

[10] NPRM at ¶ 1.

[11] *See Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services; Biennial Regulatory Review*, 13 FCC Rcd 16857, ¶ 8 (1998) ("We believe these deregulatory actions have contributed significantly to the impressive growth of competition in CMRS markets. As we have recently found, substantial progress has been made towards a truly competitive mobile telephone marketplace, resulting in lower prices and more attractive service offerings for consumers." (footnote omitted)).

[12] NPRM, Statement of Chairman Michael K. Powell.

- Rather than reflexively extending our legacy regulations to VoIP providers, we need to take this opportunity to step back and ascertain whether those rules still make sense for *any* providers, including incumbents.[13]

- We all marvel at the transformative potential of new IP services. They sizzle with possibility for consumers and businesses alike.[14]

- Today's NPRM recognizes the benefits that VoIP brings such as greater efficiency and that the Commission will approach VoIP with a light regulatory touch.[15]

- I am struck by the wealth of innovation occurring under the banner of "VoIP." As a consumer, I think we all have much to look forward to.[16]

It is no coincidence that the hands-off policy adopted by Congress and fostered by the Commission toward regulation of the Internet, and the light touch approach toward wireless services, has allowed these services to flourish. Thus, Cable Ops suggest a similar approach for IP-enabled services. In particular, Cable Ops agree with the widely-held view that there is no legal or policy basis for economic (*e.g.*, rate setting), entry (*e.g.*, state certification), or behavioral (*e.g.*, Quality of Service ("QoS")) regulation of VoIP.[17] As Chairman Powell has observed, "[c]ompetitive market forces, rather than prescriptive rules, will respond to public needs much more quickly and more efficiently than even the best intentioned responses of government regulators."[18] Regulation, if any, should be strictly limited to meet important social policies.[19]

Within this general framework, Cable Ops summarize below their positions in response to specific issues raised in the NPRM. First, not all forms of IP-enabled services or of VoIP should be subjected even to "light touch" regulation. Rather, such regulation should be limited

[13] NPRM, Statement of Commissioner Kathleen Q. Abernathy (emphasis in original).

[14] NPRM, Statement of Commissioner Michael J. Copps.

[15] NPRM, Statement of Commissioner Kevin J. Martin.

[16] NPRM, Statement of Commissioner Jonathan S. Adelstein.

[17] *See* NPRM at ¶ 5.

[18] NPRM, Statement of Chairman Michael K. Powell.

[19] *Id.*

to those forms of VoIP that consumers are likely to view as reasonable substitutes for traditional telephone service. To avoid confusion with the broader categories of VoIP and other IP-enabled services outlined in the NPRM, Cable Ops suggest a category of "IP Telephony" that might appropriately be subject to certain limited regulation. Cable Ops propose a three-part test to define "IP Telephony" based on the use of IP protocol where the communication enters or exits the customer's premises, assignment of standard telephone numbers, and the ability to receive calls from, and terminate calls to, the public switched telephone network ("PSTN"). Notably, VoIP services such as voice-enhanced video gaming and voice-enabled instant messaging would not be classified as IP Telephony under the foregoing criteria and would remain largely unregulated.

Second, Cable Ops believe that application of appropriate analytical factors lead to the conclusion that IP Telephony must be deemed to be jurisdictionally interstate. Not only is this conclusion dictated by law, but it is sound policy as well. As noted by Commissioner Abernathy, "[a] federal scheme will facilitate nationwide deployment strategies and avoid the burdens associated with inconsistent state rules."[20] Nevertheless, just as the FCC in 1972 generally occupied the field of cable television regulation while carving out a limited role for local authorities, the conclusion that IP Telephony is an interstate service does not preclude limited state involvement, where appropriate to advance national policy goals and subject to FCC preemptive authority. For example, state public utility commissions might continue to serve a critical function in arbitrating interconnection agreements between IP Telephony providers and telecommunications carriers.

Third, Cable Ops believe that IP Telephony is properly classified as an "information service" subject to Title I of the Communications Act of 1934, as amended ("Act") and not as a

[20] NPRM, Statement of Commissioner Kathleen Q. Abernathy.

"telecommunications service" subject to Title II of the Act. Whether applying the analytical framework of the 1996 Act, the previous *Computer II* regime, the *Stevens Report*, or the more recent *Pulver Declaratory Order* and *AT&T VoIP Order*, it is clear that IP Telephony meets the definition of an "information service." The vast majority of IP Telephony traffic will originate or terminate at the customer's premises in IP format, and then be converted to traditional circuit-switched transmission for connection with PSTN customers. This "net change in protocol" is the classic *sine qua non* of an information service. Moreover, traffic that both originates and terminates as IP Telephony also meets the definition of an information service given the capability "for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications."[21]

Fourth, Cable Ops agree that the classification of IP Telephony should carry with it the responsibility to advance certain overriding societal goals such as the ability to summon emergency responders (911), accessibility by the hearing impaired, protection of customer privacy and cooperation with law enforcement (CALEA). While Cable Ops fully recognize the worthy objectives of the universal service program, pending completion of the Commission's ongoing efforts to reform that program, it may be premature to either require IP Telephony providers to directly fund universal service or apply for eligibility status. Similarly, given the well-recognized problems with the intercarrier compensation scheme, until a new regime is established, IP Telephony providers either should be exempt from intercarrier compensation requirements or, at least on an interim basis, should be allowed to exchange traffic with any telecommunications carrier on a mutual bill-and-keep basis. Finally, there is no legal or policy basis to apply dialing parity/anti-slamming rules to IP Telephony providers that offer all-distance service at a flat rate.

[21] 47 U.S.C. § 153(20).

Last, and by no means least, just as classification as an IP Telephony provider should carry with it certain regulatory responsibilities, specific regulatory safeguards should also be available to advance the Commission's long-standing goal to promote facilities-based residential telephone competition. For example, any IP Telephony provider should be allowed to obtain interconnection with any LEC pursuant to the standards of Sections 251 and 252 of the Act. IP Telephony providers should be entitled to participate in the North American Numbering Plan ("NANP"), and all wireline and wireless carriers should be required to port numbers to and from IP Telephony providers. Facilities-based IP Telephony providers should be allowed to apply for universal service support eligibility, at least at such time as they may be required to make payments to the universal service fund. Franchises and private contracts (*e.g.*, pole agreements, MDU contracts) restricting cable operators from offering IP Telephony should be preempted. IP Telephony providers should be afforded the protections of Section 253 against unreasonable or discriminatory exercise of right-of-way management by local governmental authorities. Finally, IP Telephony providers should have the *option* (but not the requirement) to file tariffs with the FCC and appropriate state commissions.

II. CATEGORIZATION OF IP-ENABLED SERVICES

The Commission's NPRM purports to cover an exceedingly broad universe of "IP-enabled services," which are defined to include any services or applications relying on the Internet Protocol family.[22] Within this wide range, the NPRM identifies VoIP as a subset of IP-enabled services that offer "real-time, multidirectional voice functionality, including, but not limited to, services that mimic traditional telephony."[23] The Commission correctly acknowledges that services such as VoIP "have arisen in an environment largely free of

[22] NPRM at n.1.

[23] *Id.* at n.7.

government regulation" and that the great majority "should remain unregulated." [24] Cable Ops agree with the Commission's assessment that regulatory requirements should be imposed only where "needed to further critical national policy goals," and even then any such "requirement must be tailored as narrowly as possible, to ensure that it does not draw into its reach more services than necessary."[25]

Cable Ops endorse the conceptual framework set forth by the Commission that the goal in any categorization of VoIP should be "to distinguish services that might be viewed as replacements for traditional voice telephony (and which thus raise social policy concerns relating to emergency services, law enforcement, access by individuals with disabilities, consumer protection, universal service and so forth) from other services (which do not appear to raise these same regulatory questions to the same extent)."[26]

Given the rapid evolution of new communications services using IP, the phone-to-phone end-user vs. computer-to-computer end-user classification distinction set forth in the Commission's *Stevens Report* now lacks the robustness to appropriately distinguish categories of IP-enabled services for regulatory purposes.[27] The Commission should instead establish a new, more refined classification framework that distinguishes those VoIP services that, because of their traditional telephony characteristics, might warrant some forms of regulation from those services that should be left essentially off-limits from regulation. Accordingly, Cable Ops propose that VoIP services that might qualify for some sort of regulation be classified as "IP Telephony," and three proposed criteria for classification purposes are specified below. Instead

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[24] *Id.* at ¶ 35.

[25] *Id.*

[26] *Id.* at ¶ 36.

[27] *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, ¶¶ 83-93 (1998) (*"Stevens Report"*).

of relying chiefly upon whether the customer premises device is a telephone or a computer terminal, these new criteria would instead focus on the basic functionalities of the IP-enabled service as experienced by the end-user.

As noted above, it is essential that any classification or regulatory scheme not stifle the potential of emerging IP-enabled services. At most, regulation should only be applied with a light touch and be limited to the extent necessary to serve compelling non-economic public policy goals. The Commission must also recognize that some forms of voice-enhanced IP-enabled services, because of their lack of similarity to traditional circuit-switched telephony, do not at this time justify even light touch regulation. For example, home intercoms and consumer walkie-talkies have never been subject to traditional telephone regulation, even though they each enable voice communications. Similarly, communications services such as Pulver's Free World Dialup,[28] voice-enabled instant messaging, and hybrid IP-enabled services such as those available on X-Box live, do not share the characteristics or functionalities of traditional dial-up telephone service and should remain, for the time being, essentially exempt from any regulation. On the other hand, some level of regulation (*i.e.*, to ensure CALEA compliance or emergency calling capability) could be warranted for services used by a consumer as a replacement for preexisting telephone service. Regulation, if any, should be reserved only for that subset of IP services that are likely to be viewed by the end-user as a replacement for traditional voice telephony.

To serve this goal, we propose that the Commission apply the following three functional criteria for categorization of any service as IP Telephony:

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[28] *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307 (2004) ("*Pulver Declaratory Order*").

- Uses Internet Protocol transmission at least at the point where the communication exits and enters the IP Telephony customer's premises;
- Use of NANP telephone number resources; and
- Capable of receiving calls from, or terminating calls to, customers connected to the PSTN.

The first criterion is fairly obvious – only those communications that actually use IP transmissions as they interface with the end-user should be classified as IP Telephony. However, Cable Ops stress that this proposed classification would limit IP Telephony status to communications that enter and exit the IP Telephony customer's premises using IP format. This limitation would prohibit a traditional telephone service from claiming this status simply because IP is used in one portion of the transport of a call, but is otherwise indistinguishable as it interfaces with an end-user at the local loop level. A service that both originates and terminates on the PSTN, even though an intermediate portion of the transmission might involve a protocol conversion to IP (such as AT&T's VoIP long-distance transport service), would not qualify.[29]

The final two proposed criteria have to do with the underlying functionality of the IP service, especially as utilized by the end-user. IP Telephony should be limited to those forms of VoIP that are true substitutes for traditional dial-up phone service. Any telephony end-user expects two critical functionalities from a service that it might consider as a replacement for existing phone service – use of regular phone numbers and ubiquitous calling ability. It is the availability of a phone number for other end-users to call and the ability to connect with any other end-user that drives the basic utility of any telephone service. Thus, an IP-service's use of

[29] *AT&T VoIP Order* at ¶ 12 ("End-user customers do not order a different service, pay different rates, or place and receive calls any differently than they do through AT&T's traditional circuit-switched long distance service; the decision to use its Internet backbone to route certain calls is made internally by AT&T. To the extent that protocol conversions associated with AT&T's specific service take place within its network, they appear to be "internetworking" conversions, which the Commission has found to be telecommunications services. We clarify, therefore, that AT&T's specific service constitutes a telecommunications service.").

the NANP resources combined with an end-user's ability to receive calls from, or terminate calls to, any other end-user on the PSTN should be prerequisites for imposing any telephony regulation on a provider.

The three-prong test proposed by Cable Ops is simple, straight-forward and relies entirely on objective criteria. Other criteria for categorization proposed in the NPRM are overly complex and vague, and thus would lead to protracted disputes and administrative burdens.[30] Moreover, distinctions that purport to rely on the "intent" of the provider or the way a service is "perceived" by consumers would only precipitate regulatory gamesmanship. Thus, for example, the fact that some consumers might view IP Telephony as a replacement for their current wireline telephone services, while others might subscribe as a second-line service to augment their current carrier, should not result in different regulatory treatment. Similarly, basing distinctions on whether service is offered on a peer-to-peer basis as opposed to reliance on the network services provided by a third party would undoubtedly create artificial incentives favoring one business model over another. Moreover, such a distinction might not afford sufficient flexibility to adapt to future evolution of IP architecture. The proposed Facility Layer vs. Protocol Layer vs. Application Layer scheme is even more unnecessarily complicated. While an analysis of specific "layers" may provide insights into the various elements that compose certain IP-enabled services, this approach offers little regulatory guidance. The fact that an integrated, end-to-end service may have certain features or "layers" that resemble traditional telephone service does not justify the imposition of legacy regulation, nor does it justify fragmenting an integrated service into component parts.

In sum, the criteria for imposition of the "light touch" regulatory scheme proposed herein must be simple to administer and readily apparent to providers before investment decisions have

[30] *See* NPRM at ¶ 37.

been made. Any complex categorization scheme requiring case-by-case analysis would constrain service providers, software developers, and regulators with an endless burden of decision-making and uncertainty. A secondary by-product of a new VoIP regulatory scheme should be to reduce the gamesmanship, litigation and confusion of the post-1996 Act world.

III. JURISDICTIONAL CONSIDERATIONS

The NPRM seeks comment regarding the jurisdictional nature of IP-enabled services.[31] Cable Ops contend that IP Telephony should be subject to the overriding federal jurisdiction of the Commission. However, applying the approach followed historically with regard to cable television, the Commission should retain discretion to cede jurisdiction back to the states in specific, targeted areas where necessary to better effectuate national policy goals. Decades of precedent, combined with the Commission's recent *Pulver Declaratory Order*, support this approach.

The nature of IP Telephony and Supreme Court precedent, call for federal jurisdiction of this service. Just as the Court found in 1968 that "community antenna television systems" were interstate and subject to federal jurisdiction,[32] so too should the Commission find that it holds jurisdiction over IP Telephony for similar reasons. IP Telephony enables the transmission of communications that originate in other states, and the "stream of communication is essentially uninterrupted and properly indivisible."[33] To categorize IP Telephony "as intrastate would disregard the character" of IP Telephony "and serve merely to prevent the national regulation that 'is not only appropriate but essential . . . .'"[34]

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[31] *See* NPRM at ¶ 38.

[32] *See United States v. Southwestern Cable Co.*, 392 U.S. 157, 168-69 (1968).

[33] *Id.* at 169.

[34] *Id.*

In Section IV.A. of these comments, *infra*, Cable Ops demonstrate that IP Telephony is properly classified as an information service, and not a telecommunications service. Despite the fact that IP Telephony is not governed by Title II of the Act nor, when offered by a cable operator, by Title VI of the Act, applicable precedent nevertheless supports exercise of federal jurisdiction to advance national policy goals and to avoid a patchwork of burdensome and potentially inconsistent state and local regulatory obligations. As one court has observed:

> The Communications Act was designed to endow the Commission with sufficiently elastic powers such that it could readily accommodate dynamic new developments in the field of communications. . . . Congress, in 1934, could hardly have foreseen the radical innovations in communications technology which have arisen in recent years and it is for this reason that the Act must be read as granting the Commission "a comprehensive mandate," with "not niggardly but expansive powers." *National Broadcasting Co. v. United States*, 319 U.S. 190, 219, 63 S. Ct. 997, 87 L. Ed. 1344 (1943). . . . [T]he [Supreme] Court said, "Nothing in the language of §152(a), in the surrounding language, or in the Act's history or purposes limits the Commission's authority to those activities and forms of communication that are specifically described by the Act's other provisions. The section itself states merely that the 'provisions of (the Act) shall apply to all interstate and foreign communication by wire or radio . . . .' Similarly, the legislative history indicates that the Commission was given 'regulatory power over all forms of electrical communication . . . .'" *United States v. Southwestern Cable Co.*, . . . 392 U.S. at 172, 88 S. Ct. at 2002.[35]

The Commission, not the states, received these "elastic" and "expansive" powers from Congress to accommodate new communications technologies, such as IP Telephony. IP Telephony is a form of "interstate and foreign communication" that is available by wire. Thus, Congress plainly intended that services such as IP Telephony be governed by the Commission, not the states.

An argument claiming that Section 2(b)(2) of the Act permits state regulation of IP Telephony providers as "connecting carriers" also fails under precedent.[36] Section 2(b)(2) states

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[35] *General Telephone Co. of the Southwest v. United States*, 449 F.2d 846, 853-54 (5th Cir. 1971) ("*General-Southwest*").

[36] *Id.* at 855 (citing *General Telephone Co. of California v. FCC*, 413 F.2d 390 (1969), *cert. denied*, 396 U.S. 888 (1969) ("*General-California*")).

in pertinent part that the Commission has no jurisdiction with respect to "any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier. . . ."[37] The "exclusion embodied in Section 2(b)(2) was meant to protect State jurisdiction over local telephone facilities which could place interstate calls only through their connection with major toll lines; this interstate facet of the company's operation was incidental to its primary local service."[38]

The statutory exclusion in Section 2(b)(2) does not apply to IP Telephony. IP Telephony systems are engaged in interstate communications even when carrying traffic emanating from another carrier located in the same state, and the furnishing of IP Telephony service is not "incidental" to the function of providing local telephone service, particularly where an "all distance" service is offered at a flat rate. Thus, the Commission holds the jurisdictional power to ensure that its "light touch" regulatory policy for IP Telephony is not circumvented through state regulation.

The Commission has already determined that, because IP services tend to be portable, the Commission's traditional end-to-end approach for determining jurisdiction is inappropriate. [39] Nevertheless, even if such an analysis were applicable, the Commission has classified such services as "interstate" based on the Commission's "mixed-use doctrine."[40] The "mixed-use facilities" rule, previously applied to special access lines, provides that facilities carrying both interstate and intrastate traffic are subject to the Commission's jurisdiction where it is not possible to separate the uses of the facilities by jurisdiction, and the facilities carry more than *de*

[37] 47 U.S.C. §152(b)(2).

[38] *See General-Southwest*, 449 F.2d at 855 (citing *General-California*, 413 F.2d at 402).

[39] *See* NPRM at ¶ 39 (citing *Pulver Declaratory Order* at ¶¶ 21-22).

[40] *Id.*

minimis amounts (*i.e.*, more than ten percent) of interstate traffic.[41] Just as the Commission found that ADSL service is subject to federal jurisdiction under the mixed-use facilities rule,[42] this same jurisdictional result applies to IP Telephony. The FCC has concluded "that more than a *de minimis* amount of Internet traffic is destined" for "other states or other countries."[43] Similarly, IP Telephony, which uses the same Internet protocol, should also be subject to exclusive federal jurisdiction under the Commission's mixed-use facilities rule. As Commissioner Abernathy has correctly observed, "most forms of IP communications appear to transcend jurisdictional boundaries, rendering obsolete the traditional separation of services into interstate and intrastate buckets."[44]

The Commission's *Pulver Declaratory Order* carried this precedent into the IP age. That ruling determined that Pulver's Free World Dialup ("FWD"), a peer-to-peer service that facilitates VoIP calls between subscribers by informing them when other subscribers are online or "present," is an unregulated information service subject to federal jurisdiction.[45] The Commission has explained that

> courts have recognized the preeminence of federal authority in the area of information services, particularly in the area [of] the Internet and other interactive computer services. This finding is consistent with Congress' clear intention, as expressed in the 1996 Act, that such services remain "unfettered" by federal or state regulation and with our own "hands-off" approach to the Internet. We also determined that state-by-state regulation of FWD, an Internet application, is inconsistent with the controlling federal role over interstate commerce required by the Constitution.[46]

Thus, any assertion of state jurisdiction over IP Telephony is subject to federal preemption.

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[41] *See GTE Telephone Operating Cos.*, Memorandum Opinion and Order, 17 FCC Rcd 27409, n. 8 (1999).

[42] *See GTE Telephone Operating Cos.*, Memorandum Opinion and Order, 13 FCC Rcd 22466 (1998).

[43] *Id.* at ¶ 26.

[44] NPRM, Statement of Commissioner Kathleen Q. Abernathy.

[45] *See Pulver Declaratory Order.*

[46] NPRM at ¶ 39 (citations omitted).

Indeed, the United States District Court for the District of Minnesota expressly preempted state regulation of VoIP to resolve a conflict between state and federal laws.[47] The court, interpreting congressional intent, found that Congress desired that the states not regulate information services.[48] "State regulation would effectively decimate Congress's mandate that the Internet remain unfettered by regulation."[49] Thus, the court enjoined state regulation of VoIP services.[50]

The Commission and the courts alike have recognized the bar to local and state regulation of information services. The United States Court of Appeals for the Ninth Circuit held that cable modem service contained both information service and telecommunications service components, and as "a result, the local franchise authority could not impose conditions" on the sale of a cable franchise.[51] Subsequently, the Commission determined that cable modem service is an interstate information service, and not a cable service or a telecommunications service.[52] The Commission stated that it would be concerned "if State and local regulations limited the Commission's ability to achieve its national broadband policy goals to 'promote the deployment of advanced telecommunications capability to all Americans in a reasonable and timely manner,' 'to promote the continued development of the Internet and other interactive computer services and other interactive media' and 'to preserve the vibrant and competitive free market that presently exists

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[47] See *Vonage Holdings Corp. v. Minnesota Pub. Utilities Comm'n, et. al*, Civil No. 03-5287 (MJD/JGL) (D. Minn. 2003), *mot. to intervene, amend or for new trial denied*, Civil No. 03-5287 (MJD/JGL) (D. Minn. 2004), *appeal filed*, Docket No. 04-1434 (8th Cir. 2004).

[48] *Id.* at 2.

[49] *Id.*

[50] *Id.*

[51] *Brand X Internet Services v. F.C.C.*, 345 F.3d 1120 (9th Cir. 2003), *reh'g denied*, 2004 U.S. App. LEXIS 8023 (Mar. 31, 2004), *stay granted* (April 9, 2004) ("*Brand X*") (citing *AT&T v. City of Portland*, 216 F.3d 871 (9th Cir. 2000)).

[52] See *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 at ¶ 7 (2002) ("*High-Speed Access Declaratory Ruling*"), *aff'd in part, vacated in part and remanded by Brand X, stay granted* (April 9, 2004).

for the Internet and other interactive computer services, unfettered by Federal or State regulation.'"[53] Moreover, the Commission noted "that the courts have recognized the Commission's authority under Title I to preempt non-Federal regulations that negate the Commission's goals, including regulations affecting enhanced services."[54]

Federal agencies such as the Commission may also preempt state regulation when acting within the scope of congressionally delegated authority.[55] Indeed, the Ninth Circuit upheld Commission preemption based upon the impossibility exception because it would not be "economically or operationally feasible" for the Regional Bell Operating Companies ("RBOCs") to comply with stringent state structural separations regulations when offering enhanced services while the Commission held a "more permissive policy of integration."[56] The Ninth Circuit also permitted Commission preemption concerning customer proprietary network information ("CPNI") due to the impossibility exception and because "conflicting state rules regarding access to CPNI would negate the FCC's goal of allowing the BOCs to develop efficiently a mass market for enhanced services for small customers."[57]

While Cable Ops believe that the legal case for overriding federal jurisdiction over IP Telephony is clear, this does not preclude the Commission from establishing a carefully tailored role for state and local regulation, where such involvement would facilitate advancement of national policy goals. Just as the FCC in 1972 generally occupied the field of cable television regulation while carving out a limited role for local authorities, the conclusion that IP Telephony is an interstate service does not preclude limited state involvement, where appropriate to achieve

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[53] *Id.* at ¶ 97 (citation omitted).

[54] *Id.* at ¶ 98 (citation omitted).

[55] *See Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355 (1986) (citing *Fidelity Federal Savings & Loan Assn. v. De la Cuesta*, 458 U.S. 141 (1982)); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984).

[56] *California v. F.C.C.*, 39 F.3d 919, 933 (9th Cir. 1994).

[57] *Id.*

Congressional mandates and subject to FCC preemptive authority.[58] For example, state public utility commissions might continue to serve a critical function in arbitrating interconnection agreements between IP Telephony providers and telecommunications carriers, consistent with the policy established by Congress in Sections 251 and 252 of the Act. Jurisdictional issues relating to non-federal involvement with specific aspects of IP Telephony regulation are addressed in greater detail in Section IV.C. of these Comments, *infra*.

IV. APPROPRIATE LEGAL AND REGULATORY FRAMEWORK

A. IP Telephony is Properly Classified as an Interstate Information Service and not a Telecommunications Service

Having demonstrated that IP Telephony is an interstate service subject to overriding federal jurisdiction under the Communications Act, Cable Ops now turn to the issues raised in the NPRM regarding whether IP Telephony is properly classified as an "information service" under Title I or a "telecommunications service" under Title II.[59] For the reasons set forth below, IP Telephony must properly be classified as an interstate information service, and not a telecommunications service.

The first step in this analysis is to review applicable statutory language. In the 1996 Act, Congress included definitions of the terms "telecommunications," "telecommunications service," and "information service."[60] Telecommunications is defined in the statute as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in form or content of the information as sent and received."[61] A "telecommunications service" is "the offering of telecommunications for a fee directly to the public, or to such classes

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[58] *See Cable Television Report and Order*, 36 FCC 2d 143, ¶¶ 171-177 (1972); *Amendment and Clarification of Cable Television Service Rules*, 46 FCC 2d 175, ¶¶ 41-44 (1974).

[59] NPRM at ¶¶ 42-43.

[60] 47 U.S.C. §§ 153(20), (43), and (46).

[61] 47 U.S.C. § 153(43).